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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
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11 WAYLAND DEE KIRKLAND,

No. CIV S-02-1266-DFL-CMK-P

12 Petitioner,

13 vs.

ORDER

14 D.K. BUTLER, et al.,

15 Respondents.
16 _____/

17 Petitioner, a state prisoner proceeding pro se, brings this petition for a writ of
18 habeas corpus pursuant to 28 U.S.C. § 2254. Pending before the court is petitioner's notice of
19 appeal, which is also construed as a request for a certificate of appealability.

20 Petitioner, a state prisoner proceeding pro se, has timely filed a notice of appeal of
21 this court's September 26, 2005, dismissal of his application for a writ of habeas corpus for
22 failure to exhaust state remedies. Before petitioner can appeal this decision, a certificate of
23 appealability must issue. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). A certificate of
24 appealability may issue under 28 U.S.C. § 2253 "only if the applicant has made a substantial
25 showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The court must either
26 issue a certificate of appealability indicating which issues satisfy the required showing or must

